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AMIR HARIRI ABD HADI v. PP

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ABANG ISKANDAR PCA
NALLINI PATHMANATHAN FCJ
B RHODZARIAH BUJANG FCJ
MOHD NAZLAN GHAZALI JCA
[CRIMINAL REFERENCE NO: 06(RJ)-1-08-2024(W)]
1 JULY 2025
[2025] CLJ (JT8)

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Abstract – *Section 9(5) of the Peaceful Assembly Act 2012, which makes it illegal for an organiser to not give notice to the police before a peaceful rally, is unconstitutional and is no longer a valid law in Malaysia. The said provision is a disproportionate and discriminatory restriction that excessively curtails the right to peaceful assembly guaranteed by art. 10(1)(b) of the Federal Constitution, exceeding the permissible restrictions enshrined in art. 10(2)(b).*

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E ***CONSTITUTIONAL LAW:*** *Fundamental liberties – Right to freedom of speech and expression – Right to peaceful assembly – Parliamentary restrictions on assembly rights – Notification of assembly and requirement of giving ten days' notice to police – Organiser failed to give police ten days' notice – Whether requirement to give notice reasonable – Whether non-compliance to give required notice detrimental to organiser – Whether in breach of safeguarding provisions – Whether s. 9(1) & (5) of Peaceful Assembly Act 2012 void – Whether inconsistent with Federal Constitution – Federal Constitution, arts. 4(1), 8(1), 10(1)(b) & 10(2)(b)*

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The applicant had organised a rally to protest a contract awarded by the Ministry of Defence to a certain corporation which, in his view, was a scandal as it was never performed. The rally, organised as a peaceful assembly, took place at the Sogo Complex, Jalan Tuanku Abdul Rahman, Kuala Lumpur, on 14 August 2022, at around 2pm and was attended by some 60 individuals. The rally ended peacefully. The applicant was later charged at the Magistrates' Court for an offence under s. 9(5) of the Peaceful Assembly Act 2012 ('PAA'), *ie*, for organising the said rally without prior notification, as required by s. 9(1). No person who attended the rally, other than the applicant, was charged with the said offence. The applicant applied to refer constitutional questions, from the Magistrates' Court to the High Court; the High Court then transmitted to this court, culminating in this constitutional reference. The constitutional questions posed for the court's determination were: (i) whether s. 9(5) of the PAA was unconstitutional for being inconsistent with art. 10(2)(b) read with art. 8 of the Federal

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Constitution ('FC') ('first part of the first question'); (ii) arising from this, whether the Court of Appeal in *Nik Nazmi Nik Ahmad v. PP*, which decided that s. 9(5) of the PAA was unconstitutional, or the Court of Appeal in *PP v. Yuneswaran Ramaraj*, which decided that s. 9(5) of the PAA was constitutional, was correct in light of the established principle of law that the Court of Appeal was bound by its earlier decision as propounded in the Supreme Court case in *Dalip Bhagwan Singh v. PP* ('second part of the first question'); and (iii) whether s. 9(5) of the PAA was unconstitutional for being inconsistent with art. 10(2)(a) of the FC on the right to freedom of speech and expression, read with art. 8 of the FC ('second question').

Held (striking down s. 9(5) of Peaceful Assembly Act 2012 as null and void)

Per Tengku Maimun Tuan Mat CJ delivering the judgment of the court:

(1) Section 9(5) of the PAA was a discriminatory restriction that disproportionately curtailed the right to the freedom of peaceful assembly guaranteed by art. 10(1)(b) of the FC. The PAA was passed with the express and implied intention of preserving the right to peaceful assembly guaranteed by art. 10(1)(b). However, in this equation, it did not appear that s. 9(5), when read with s. 9(1), when considered in totality, was consistent with that noble intention. If s. 9(5) was to ensure that the police are notified of any upcoming assemblies so that they can be on guard to take protective action, then such an intention was clearly not manifest in the way it was couched. (paras 64-66)

(2) An organiser, whomever that person is and who fails to give notice of an assembly, can be charged with and convicted of an offence under s. 9(5) of the PAA, even if the assembly takes place and ends peacefully. This offence discriminates the organiser against the gatherers of his/her assembly who commit no offence while the organiser is guilty of one. (para 67)

(3) Section 9(5) of the PAA appeared to be a blanket prohibition than a restriction. The word 'restriction' suggests that the act in question is permissible but that, instead of a blanket right to exercise it in howsoever way one pleases, Parliament can impose certain restrictions or rules regarding the exercise of the right. In this sense, Parliament does not interfere with or control the substantive right itself; rather, it regulates the way and manner and means by which it is done without hampering the right itself. By a stark contrast, a prohibition is a total denial of a given right. (paras 69-71)

(4) Assemblies do not happen spontaneously or serendipitously; it takes time, planning and resources to get more than two people to gather at any location and place with the intention to assemble peaceably. The act

of criminalising the right of any citizen, to organise an assembly, is no different than any incursion of another citizen's right to attend such an assembly. Yet, s. 9(5) of the PAA makes this distinction by criminalising the organising of an assembly but not the attending of the assembly itself. To make matters worse, the offence in s. 9(5) fastened even in a situation where the assembly so organised ends peacefully as its organisers may, nonetheless, be called to face a criminal charge for, in effect, organising a peaceful assembly – a right otherwise guaranteed to him by art. 10(2)(b) of the FC. (paras 76 & 77)

(5) Section 9(5) of the PAA was (i) a disproportionate incursion into the right to peaceful assembly guaranteed to all citizens by art. 10(1)(b) of the FC; (ii) in excess of any restrictions that may be imposed on any of the permissible grounds stated in art. 10(2)(b); (iii) not validly enacted under art. 10(2)(b) and could not be deemed as validly restricting the right guaranteed to all citizens by art. 10(1)(b); and (iv) violated the rights to peaceful assembly under art. 10(1)(b) of the FC and must be struck down as null and void under art. 4(1) of the FC. (para 87)

(6) The first part of the first question was answered in the affirmative. It was not necessary to deal with the *stare decisis* point in the second part of the first question. The court declined to answer the second question. The case was remitted to the High Court. (paras 90 & 91)

Bahasa Melayu *Headnotes*

Pemohon telah menganjurkan satu perhimpunan demi membantah satu kontrak yang diawardkan oleh Kementerian Pertahanan pada sebuah perbadanan yang, pada pendapatnya, satu skandal kerana ini tidak pernah terlaksana. Perhimpunan tersebut, yang dianjurkan sebagai satu perhimpunan aman, diadakan di Kompleks Sogo, Jalan Tuanku Abdul Rahman, Kuala Lumpur, pada 14 Ogos 2022, pada pukul 2 petang dan dihadiri seramai lebih kurang 60 orang. Perhimpunan yang dilangsungkan berakhir dengan aman. Pemohon kemudian dituduh di Mahkamah Majistret bersangkutan satu kesalahan bawah s. 9(5) Akta Perhimpunan Aman 2012 ('APA'), kerana menganjurkan satu perhimpunan tanpa makluman terdahulu, seperti yang dikehendaki oleh s. 9(1). Tiada siapa-siapa pun yang menghadiri perhimpunan tersebut, selain pemohon, yang dihadapkan dengan pertuduhan ini. Pemohon memohon untuk merujuk soalan-soalan perlembagaan, dari Mahkamah Majistret ke Mahkamah Tinggi; Mahkamah Tinggi lalu memindahkannya ke mahkamah ini, yang berkemuncak dengan rujukan perlembagaan ini. Soalan-soalan perlembagaan yang diutarakan untuk pemutusan mahkamah adalah: (i) sama ada s. 9(5) APA tidak berperlembagaan kerana tidak selari dengan per. 10(2)(b) dibaca bersama-sama per. 8 Perlembagaan Persekutuan ('PP') ('bahagian pertama soalan pertama'); (ii) ekoran itu, sama ada Mahkamah Rayuan dalam *Nik Nazmi Nik*

Ahmad v. PP, yang memutuskan bahawa s. 9(5) APA tidak berperlembagaan, atau Mahkamah Rayuan dalam *PP v. Yuneswaran Ramaraj*, yang memutuskan bahawa s. 9(5) APA berperlembagaan, adalah betul berdasarkan prinsip mantap undang-undang bahawa Mahkamah Rayuan terikat dengan keputusan terdahulunya, seperti yang diajukan dalam kes Mahkamah Agung *Dalip Bhagwan Singh v. PP* ('bahagian kedua soalan pertama'); dan (iii) sama ada s. 9(5) APA tidak berperlembagaan kerana tidak selari dengan per. 10(2) PP berkenaan hak kebebasan bersuara, dibaca bersama-sama per. 8 PP ('soalan kedua').

Diputuskan (membatalkan s. 9(5) Akta Perhimpunan Aman 2012 atas alasan terbatal dan tidak sah)
Oleh Tengku Maimun Tuan Mat KHN menyampaikan penghakiman mahkamah:

(1) Seksyen 9(5) APA adalah sekatan mendiskriminasi yang, secara tidak seimbangnya, mengehadkan hak kebebasan perhimpunan aman yang terjamin oleh per. 10(1) PP. APA diluluskan dengan niat nyata dan tersirat untuk mengekalkan hak perhimpunan aman yang terjamin oleh per. 10(1)(b). Walau bagaimanapun, dalam persamaan ini, s. 9(5), apabila dibaca bersama-sama s. 9(1), setelah dipertimbangkan secara menyeluruh, tampil tidak sejajar dengan niat mulia tersebut. Jika s. 9(5) berniat memastikan polis dimaklumkan tentang perhimpunan-perhimpunan akan datang, agar mereka boleh mengawal demi mengambil tindakan melindung, maka niat tersebut jelas tidak dizahirkan seperti yang diungkapkan.

(2) Seorang penganjur, siapa-siapa jua orang itu, yang gagal memberi notis tentang satu perhimpunan, boleh dituduh dan disabitkan dengan pertuduhan bawah s. 9(5) APA, jika pun perhimpunan tersebut berlangsung dan berakhir dengan aman. Kesalahan ini mendiskriminasikan si penganjur terhadap orang-orang yang berkumpul di perhimpunannya yang tidak melakukan apa-apa kesalahan sedangkan si penganjur didapati bersalah.

(3) Seksyen 9(5) APA seperti satu larangan menyeluruh berbanding satu sekatan. Perkataan 'sekatan' mencadangkan bahawa tindakan yang dipertikai dibenarkan tetapi bahawa, sebalik satu hak menyeluruh untuk menjalankannya dalam apa-apa jua cara yang diinginkan, Parlimen boleh mengenakan sekatan-sekatan atau peraturan-peraturan tertentu berkaitan pelaksanaan hak tersebut. Dalam erti ini, Parlimen tidak campur tangan atau mengawal hak substantif itu sendiri; sebaliknya, Parlimen menyelia cara bagaimana ini dilakukan tanpa menghalang hak itu sendiri. Sebagai perbandingan ketara, satu larangan adalah satu penafian penuh hak yang diberi.

(4) Perhimpunan-perhimpunan tidak berlaku secara spontan atau kebetulan; perhimpunan-perhimpunan menuntut masa, perancangan dan sumber-sumber untuk mendapatkan lebih dua orang agar berhimpun di mana-mana lokasi dan tempat dengan niat berhimpun secara aman. Tindakan menjadikan hak mana-mana warganegara, untuk menganjurkan satu perhimpunan, satu jenayah, tiada beza dengan apa-apa serangan mendadak terhadap hak warganegara untuk menghadiri perhimpunan sedemikian. Seksyen 9(5) APA, akan tetapi, membezakannya dengan menjadikan anjuran perhimpunan sedemikian satu jenayah tetapi bukannya kehadiran dalam perhimpunan itu sendiri. Merumitkan lagi perkara ini, kesalahan dalam s. 9(5) ini tersabit walau dalam situasi apabila perhimpunan yang dianjurkan berakhir secara aman kerana penganjur-penganjurnya boleh, meskipun begitu, dipanggil untuk berhadapan dengan pertuduhan jenayah kerana, secara efektifnya, menganjurkan perhimpunan aman – sesuatu yang, jika tidak, dijamin terhadapnya oleh per. 10(2)(b) PP.

(5) Seksyen 9(5) APA (i) satu serangan mendadak yang tidak seimbang terhadap hak berhimpun secara aman, yang dijamin atas semua warganegara oleh per. 10(1)(b) PP; (ii) melebihi apa-apa sekatan yang boleh dikenakan atas apa-apa asas yang dibenarkan, yang termaktub dalam per. 10(2)(b); (iii) tidak digubal secara sah bawah per. 10(2)(b) dan tidak boleh dikatakan secara sah menyekat hak warganegara yang dijamin oleh per. 10(1)(b); dan (iv) mencabuli hak-hak perhimpunan aman bawah per. 10(1)(b) PP dan mesti dibatalkan atas alasan terbatal dan tidak sah bawah per. 4(1) PP.

(6) Bahagian pertama soalan pertama dijawab secara afirmatif. Tiada keperluan untuk menjawab hujahan *stare decisis* dalam bahagian kedua soalan pertama. Mahkamah enggan menjawab soalan kedua. Kes dikembalikan ke Mahkamah Tinggi.

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***
Lai Hen Beng v. PP [2024] 1 CLJ 681 FC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Mlungwana And Others v. S And Another [2018] ZACC 45 ***(refd)***
PP v. Azmi Sharom [2015] 8 CLJ 921 FC ***(refd)***
PP v. Pung Chen Choon [1994] CLJU 208; [1994] 1 LNS 208 SC ***(refd)***
PP v. Yuneswaran Ramaraj [2015] 9 CLJ 873 CA ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Young & Bristol Aeroplane Co Ltd [1944] KB 718 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37A
Federal Constitution, arts. 4(1), 5(1), 8(1), 10(1)(b), (2)(a), (b)
Peaceful Assembly Act 2012, ss. 2, 9(1), (5)
Penal Code, ss. 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160
Police Act 1967, s. 27

Regulation of Gatherings Act 205 of 1993 [South Africa], s. 12(1)(a)

For the applicant - Gurdial Singh Nijar, Abraham Au Tian Hui, New Sin Yew, Joshua Tay H'ng Foong, Vam Shir Mooi, Beatrice Chin Yuen Xin & Yap Pui Yi; M/s Jeffrey Tan & Chng
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Watching brief for HAKAM - Gan Pei Fern & O Ying Xin; M/s Lee & Poh Partnership & M/s Yeoh Mazlina & Partners

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat CJ:

Introduction

[1] These proceedings concern the constitutional validity of s. 9(5) of the Peaceful Assembly Act 2012 (Act 736) ('PAA 2012') *vis-à-vis* art. 10 of the Federal Constitution ('FC').

[2] As s. 9(5) is a criminal provision predicated on the non-performance of a statutorily mandated act under s. 9(1) of the PAA 2012, s. 9(5) must be read with s. 9(1), and they provide:

> Notification of Assembly
>
> 9. (1) An organizer shall, five days before the date of an assembly, notify the Officer in charge of the police District in which the assembly is to be held.
>
> (2) ...
>
> (3) ...
>
> (4) ...
>
> (5) A person who contravenes sub-s. (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

[3] To be clear, the applicant only assails the constitutional validity of the penal provision in s. 9(5) that seeks to punish non-compliance with the notification requirement in s. 9(1) but he does not otherwise impugn the constitutional validity of s. 9(1) itself.

[4] Before we proceed further with this judgment, and for the avoidance of doubt, and unless stated otherwise, any references to 'section(s)' in this judgment shall be taken as referring to the section(s) of the PAA 2012. Likewise, any references to 'article(s)' in this judgment shall, unless otherwise stated, be construed as references to the article(s) of the FC.

[5] Clauses (1)(b) and (2)(b) of art. 10, against which the validity of s. 9(5) is principally called into question, in turn guaranteeing thus:

> Freedom of speech, assembly and association
>
> 10. (1) Subject to Clauses (2), (3) and (4):
>
> (a) ...
>
> (b) all citizens have the right to assemble peaceably and without arms;
>
> (c) ...
>
> (2) Parliament may by law impose:
>
> (a) ...;
>
> (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order; ...

[6] The case advanced by the applicant is that s. 9(5) is void under art. 4(1) because it violates cls. (1)(b) and (2)(b) of art. 10, and that it should, accordingly, be struck down.

[7] What is uniquely interesting in this case is that the Court of Appeal in a previous decision in *Nik Nazmi Nik Ahmad v. PP* [2014] 4 CLJ 944; [2014] 4 MLJ 157 ('*Nik Nazmi*') had already declared s. 9(5) unconstitutional for the reasons advanced therein. However, in a later decision in *PP v. Yuneswaran Ramaraj* [2015] 9 CLJ 873; [2015] 6 MLJ 47 ('*Yuneswaran*'), the Court of Appeal radically departed from its reasoning *Nik Nazmi* and held the complete opposite – that s. 9(5) is not unconstitutional.

[8] It must be noted for completeness that s. 9 was amended in 2019 *vide* the Peaceful Assembly (Amendment) Act 2019 [Act A1600] to reduce the notification period in s. 9(1) from "ten days" to the presently existing period of "five days". Subsection 9(5) remains intact in that a failure to make the notification within the five days is still an offence and punishable in the manner described in that subsection.

[9] As such, and further noted for completeness is that though the aforementioned amendment was made four years after the Court of Appeal decision in *Yuneswaran*, the amendment itself is of no consequence to the present challenge.

[10] This is because, and at the risk of repetition, what the applicant is now challenging is not the mandatory requirement for the organiser to give notice to the officer in charge of the police district prior to holding the peaceful assembly nor the length of the notice period; rather it is the criminalisation in s. 9(5) of the organiser's failure to give such notice be it five days prior or ten days prior to the peaceful assembly as per s. 9(1).

[11] For this reason, the *ratio decidendi* and the substratum of the challenges in both *Nik Nazmi* and *Yuneswaran* as regards the constitutional validity of s. 9(5) remain, in some sense, germane to the present challenge.

Background

[12] The applicant is a high-ranking member of a Malaysian political party. On 14 August 2022, he organised a rally at the Sogo Complex at Jalan Tuanku Abdul Rahman, Kuala Lumpur. The purpose was to protest a contract awarded by the Ministry of Defence to a certain corporation. The applicant labelled this contract as a scandal because, as he alleged, the contract was never performed.

[13] The rally that he organised on 14 August 2022 took place at around 2pm on that date and was attended by some 60 individuals.

[14] On 26 August 2022, the applicant was charged in the Magistrates' Court for an offence under s. 9(5), *ie*, for organising the said rally without prior notification as required by s. 9(1).

[15] From the overall context of the case and the facts as they appear from the record, and without prejudicing the applicant's defence to the s. 9(5) criminal charge, the following material facts are undisputed:

(i) No person who attended the rally other than the applicant was charged with an offence under s. 9(5); and

(ii) The rally that the applicant organised and which took place on 14 August 2022 was organised as a peaceful assembly and indeed ended peacefully.

[16] Consistent with the provisions of the Courts of Judicature Act 1964 ('CJA 1964'), the applicant applied to refer constitutional questions from the Magistrates' Court to the High Court and which the High Court further transmitted them to this court, culminating in this constitutional reference.

[17] The two questions that are posed for this court's determination in this special case are as follows: ('questions'):

> Question 1
>
> First Part: Whether s. 9(5) of the PAA 2012 is unconstitutional for being inconsistent with art. 10(2)(b) read with art. 8 of the FC?
>
> Second Part: Arising from this, whether the Court of Appeal in *Nik Nazmi Nik Ahmad v. Public Prosecutor* [2014] 4 MLJ 157 which decided that Section 9(5) of the PAA 2012 is unconstitutional or the Court of Appeal in *Public Prosecutor v. Yuneswaran Ramaraj* [2015] 6 MLJ 47 which decided that s. 9(5) of the PAA was constitutional was correct in light of the established principle of law that the Court of Appeal is bound by its earlier decisions as propounded in the Supreme Court case in *Dalip Bhagwan Singh v. Public Prosecutor* [1998] 1 MLJ 1.
>
> Question 2
>
> Whether s. 9(5) of the PAA 2012 is unconstitutional for being inconsistent with art. 10(2)(a) of the FC on the right to freedom of speech and expression read with art. 8 of the FC.

[18] As will be noted and for the avoidance of doubt, we have divided question 1 into 'first part' and 'second part'.

Submissions

The Appellant's Case

[19] Premised on the questions, the applicant's contentions are effectively two-fold.

[20] First, a large bulk of their arguments centre on the dichotomy between the two cases of *Nik Nazmi* and *Yuneswaran*. We shall refer to this as the 'first point' or '*stare decisis*' point which arises from the second part of question 1.

[21] The fulcrum of the *stare decisis* argument is the timeless English decision in *Young & Bristol Aeroplane Co Ltd* [1944] KB 718 ('*Young*') which was followed in Malaysia in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1 ('*Dalip*') for the proposition of law that the Court of Appeal is bound by its prior decisions and accordingly, cannot depart from them unless certain exceptions are met. According to the applicant, none of those exceptions applied and as such the Court of Appeal in *Yuneswaran* had no legal basis to depart from its own earlier pronouncement in *Nik Nazmi*.

[22] The argument does not stop there. It goes further to contend that at the time *Yuneswaran* was decided, the Federal Court had already rendered judgment in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 ('*Sivarasa*') which held that the reasonableness test applies, contrary to a much earlier Supreme Court decision in *PP v. Pung*

Chen Choon [1994] CLJU 208; [1994] 1 LNS 208; [1994] 1 MLJ 566 ('*Pung*'). The Court of Appeal in *Yuneswaran* applied *Pung* against the Federal Court's direction in *Sivarasa* and in doing so, further defied *stare decisis*.

[23] As such, the main target of the first point is purely the technical ground of *stare decisis* and the primary motive behind it is for this court to settle the conflict in the two diverging decisions in *Nik Nazmi* and *Yuneswaran*. The applicant urges us, in effect, to declare that *Yuneswaran* was decided *per incuriam* and to thereby uphold the decision in *Nik Nazmi* as correct to the extent that *Nik Nazmi* declared s. 9(5) unconstitutional and struck it down under art. 4(1).

[24] The second major aspect of the argument substantively addresses the constitutional validity of sub-s. 9(5) against art. 10(2) read with art. 8(1) premised on the latest decisions that relate to the notions of the 'reasonableness test' and 'proportionality' established respectively in *Sivarasa* and *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1 ('*Alma Nudo*').

[25] Clause 1(b) of art. 10 guarantees that all citizens have the right to assemble peaceably and without arms. Article 10(2), however, says that Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order, against the right to peaceful assembly guaranteed in art. 10(1)(b).

[26] In this regard and in respect of the second point is the applicant's contention that in line with cases such as *Sivarasa*, *Nik Nazmi*, and *Alma Nudo*, any restrictions that Parliament may by law impose must be reasonable and/or proportionate to the legitimate aims of that law and that in this case, s. 9(5) is neither reasonable nor proportionate. As such, the applicant asserts that substantively, s. 9(5) is inconsistent with cls. 10(1)(b) and 10(2)(a) and (b) and accordingly, it should be declared null and void and be struck down under art. 4(1).

[27] The argument also extends in principle to art. 10(1)(a) and 10(2)(a) to the extent that they concern the right to free speech and expression and whether the restriction enacted by Parliament in s. 9(5) imposes a disproportionate statutory restriction on those rights.

The Respondent's Case

[28] On the first point which relates to *stare decisis*, the respondent does not take any issue with judicial articulations on the principles of judicial precedent. They agree and accept the principles stated in *Young* and *Dalip*. Having accepted them, the respondent's position is that in deciding *Yuneswaran*, the Court of Appeal was entitled to depart from *Nik Nazmi*.

[29] The respondent's reasoning is this. *Nik Nazmi* was a decision of the Court of Appeal and it was therefore bound by the higher authority in *Pung*. The respondent submits that the Court of Appeal in *Yuneswaran* correctly observed that *Nik Nazmi* should not be followed as the Court of Appeal in that case was bound to follow *Pung* and not *Sivarasa*.

[30] The respondent further submits that the Federal Court's articulation of the 'reasonableness test' in *Sivarasa* was only *obiter dicta* whereas in *Pung*, it was *ratio* and therefore binding on the Court of Appeal in *Nik Nazmi*. It was thus imperative that the Court of Appeal there to follow *Pung* and not *Sivarasa*. As such, the respondent highlights how the Court of Appeal later in *Yuneswaran* noted this mistake and correctly followed *Pung*'s case.

[31] Putting it in simpler terms, the respondent's case is that the Court of Appeal in *Yuneswaran* was entitled to depart from *Nik Nazmi* consonant with the principles established in *Young* and *Dalip* as, in the first place, and as the respondent seems to hint: *Nik Nazmi* was decided *per incuriam*.

[32] Additionally, the respondent appears to suggest that any discrepancies that arose out of the conflict between *Nik Nazmi* and *Yuneswaran* were eventually settled by this court, the apex court, in *PP v. Azmi Sharom* [2015] 8 CLJ 921; [2015] 6 MLJ 751 ('*Azmi Sharom*'). By having overruling *Sivarasa* on the 'reasonableness test' and accepting the principles articulated in *Pung*, the Federal Court effectively took the same approach as the Court of Appeal in *Yuneswaran*. As such, the respondent submits that *Yuneswaran* is both substantively a correct decision and procedurally not invalid for having departed from *Nik Nazmi*.

[33] In any case, the respondent does not submit much on the *stare decisis* point. Rather, the learned Deputy Public Prosecutor spends more time addressing the applicant's second point that concerns the substantive validity of s. 9(5) as tested against art. 10(1)(a) and (b) and art. 10(2)(a) and (b). The respondent recanvassed the arguments relating to the 'reasonableness test' and why it is not applicable by reference to the drafting history of art. 10. These arguments appear to have been adopted and accepted in *Azmi Sharom* and we do not consider it necessary to repeat them.

[34] Nevertheless, the respondent accepts that the doctrine of proportionality remains applicable to art. 10 by reference to *Azmi Sharom* which held the doctrine applicable in Malaysia and in which case the Federal Court proceeded to deliberate on the validity of another unrelated statutory provision on the basis of proportionality. In accepting that any restrictions that Parliament may impose by law through art. 10(2) are not without limit and are subject to proportionality, the Federal Court in *Azmi Sharom* stated:

> [43] In this regard, we agree with the learned judge in *Sivarasa Rasiah*, that the restriction that may be imposed by the Legislature under art. 10(2) is not without limit. This means to say that the law promulgated under

art. 10(2) must pass the proportionality test in order to be valid. This, in our view is in line with the test laid down in *Pung Chen Choon* discussed earlier ...

[35] In their submission, the respondent asserts that s. 9(5) is not disproportionate to the legitimate aim of its enactment. To be clear, in making this submission, the respondent has addressed two important facets. The first facet concerns whether there was, in Parliament's passing of s. 9(5), a legitimate aim behind it. Second, whether the modality adopted in s. 9(5) is a proportionate legislative measure commensurate to that legitimate aim.

[36] In relation to the first facet, we find that there is not really a significant dispute. The aims for which Parliament can pass laws such as the PAA 2012 generally and s. 9(5) thereof specifically to restrict the right to freedom of peaceful assembly are enumerated in art. 10(2)(b), *ie*, on grounds where Parliament deems such restrictions necessary or expedient in the interest of the security of the Federation or any part thereof or public order.

[37] The larger question in this case is whether s. 9(5) is a proportionate measure to those legitimate constitutional aims. As stated earlier, the respondent suggests that s. 9(5) is a proportionate legislative measure to restrict the right of freedom of peaceful assembly on those constitutional grounds, for the following reasons as stated in their primary written submissions at [34]:

(i) The legislative intent behind the passing of the PAA 2012 in general is to regulate assemblies held in public places and to provide protection for the rights and freedoms of others (peaceful enjoyment of their property, freedom of movement, enjoyment of the natural environment and conducting business);

(ii) That the above is evinced by the preamble to the PAA 2012 to the extent that the Act was passed to fairly restrict the right to assemble peaceably and without arms, and to provide for such restrictions as may be necessary or expedient in relation to that right in the interests of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of others;

(iii) In s. 2, the PAA 2012 reiterates Parliament assurances that all citizens have the right to organise assemblies or to participate in assemblies, peaceably and without arms and that the exercise of that right shall be subject only to such restrictions as are necessary or expedient in a democratic society in the interests of the security of the Federation or any part thereof or of public order, including the protection of the rights and freedoms of others;

(iv) In relation to s. 9(1), the legislative intention is, among others, to enable interested persons to express any concerns or objections to the assembly. In support of this, the respondent relies on the following statement of the then Minister, Dato' Seri Mohamed Nazri Abdul Aziz, who in moving the Peaceful Assembly Bill 2011, said in Parliament as follows (see: DR, 29 November 2011, at pp. 57 to 58):

> Dalam perkara ini, fasal 9(1) hendaklah dibaca bersama dengan fasal 14 bahawa apabila polis menerima notis pemberitahuan perhimpunan daripada penganjur, polis perlu memberi respond dalam masa lima hari sahaja. Sekiranya polis gagal untuk memberi respond terhadap pemberitahuan itu, perhimpunan itu hendaklah diteruskan. Itu dia, bagi polis lima hari untuk respons.
>
> Jadi, dalam masa lima hari ini perkara-perkara berikut hendaklah dilakukan:
>
> (i) perjumpaan pihak polis dengan penganjur sebaik sahaja diberitahu tentang perhimpunan yang akan diadakan seperti yang diperuntukkan dalam fasal 13;
>
> (ii) PDRM untuk memaklumkan kepada orang yang mempunyai kepentingan dalam tempoh 24 jam; dan
>
> (iii) orang-orang yang mempunyai kepentingan memaklumkan sebarang kebimbangan atau bantahan terhadap perhimpunan kepada PDRM dalam tempoh 48 jam; ...

(v) In other words, the enactment of s. 9(1), is, and among other reasons, to enable interested persons to raise any concerns or objections against the intended assembly. The imposition of an offence and fine on the organiser of an assembly who fails to notify the officer in charge of the Police District where the assembly will be held under s. 9(5) serves as a deterrent against all organisers who fail to comply with s. 9(1) consistent with the objective of the PAA 2012 to provide protection for the rights and freedoms of others who benefit from public order and security;

(vi) The collective restrictions in s. 9(1) and (5) are not, whether taken together or separately, a total prohibition or restriction on any person intending to assemble peacefully and without weapons;

(vii) The requirement to notify the police in s. 9(1) is a legislative measure that Parliament deems necessary or expedient to enable a balance to be struck between the right to assemble and the protection of public rights and order. The enforcement of s. 9(1) through s. 9(5) is therefore an attendant necessity. In support of their general proposition on s. 9(1) the

respondent also places reliance on the judgment of this court in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277 ('*Letitia Bosman*') to the extent that the Federal Court held that the appropriate party to determine legal policy is Parliament and not the courts.

[38] The respondent then urges us to uphold the decision in *Yuneswaran* as being correct to the extent that it held, consistent with the reasons given by the respondent above on its validity, that s. 9(5) is not unconstitutional.

[39] If we understand the respondent correctly, their submission may be summarised thus. The PAA 2012 was passed specifically with the intention to promote peaceful assemblies and to impose legitimate restrictions on that right in line with the grounds permissible in art. 10(2)(b). The basis for enacting s. 9(1) is to allow the police to know first-hand about the intended assemblies and to take appropriate measures after that to secure those assemblies if need be.

[40] As such, the intention (according to the respondent) behind s. 9(5) is clear in that it seeks to punish any person who organises any peaceful assembly without providing prior notification to the police per s. 9(1). The prosecution of such persons is not a disproportionate measure in that it enables the government to ensure, among other things, public order and security of the Federation by in effect, incentivising the giving of notice upon the fear of criminal punishment.

[41] We have also benefited from written and oral submissions from various *amici curiae* on the legal validity of s. 9(5) and we thank them for their efforts. We shall only refer to their submissions of law wherever and whenever necessary to address any arguments not already addressed with sufficient detail by either party to these proceedings.

Analysis/Decision

Stare Decisis

[42] As stated earlier, a large bulk of the applicant's arguments centre on the dichotomy between the two Court of Appeal decisions in *Nik Nazmi* and *Yuneswaran* and how they did not comply with the trite principles of *stare decisis* as long established in *Young* and *Dalip*.

[43] However, looking at the bigger picture, we must admit that such a finding does very little in terms of deciding the constitutional validity of sub-s. 9(5) by reference to just *Nik Nazmi* and *Yuneswaran*. The fact remains that after *Yuneswaran* was decided, the Federal Court rendered its decision in *Azmi Sharom* wherein this court did, in part, endorse the decision in *Pung* to the extent of rejecting the 'reasonableness test'.

[44] As such, the larger question warrants a proper restatement of the law as it relates to art. 10 and the principles of proportionality espoused by the apex court decisions in *Azmi Sharom* and other cases beyond what was already decided in *Nik Nazmi* and *Yuneswaran*.

Article 10 And Proportionality

[45] The Court of Appeal in *Nik Nazmi* was in large part persuaded by the decision in *Sivarasa* which held that Parliament can only impose legislative restrictions that pass the 'reasonableness test'. On the other hand, the Federal Court in endorsing *Pung* in *Azmi Sharom* effectively preferred the proportionality test and that stands as the position of our law.

[46] We do not consider it necessary to dive too deeply into the arguments that were raised and decided in all those cases. Suffice it to say that the most fundamental recent authority on 'proportionality' is the judgment of this court in *Alma Nudo albeit* that it concerning proportionality within the context of arts. 5(1) and 8(1).

[47] In our assessment of the authorities including *Sivarasa*, *Azmi Sharom* and *Alma Nudo*; the considerations that are applicable to art. 10 *vis-à-vis* the doctrine of proportionality and its constitutional grounding in art. 8(1) are conceptually the same. To explain this, a brief recap of *Alma Nudo* is necessary.

[48] *Alma Nudo* concerned the constitutional validity of s. 37A of the Dangerous Drugs Act 1952 ('DDA 1952') to the extent that it allowed the prosecution to rely on double presumptions. In *Alma Nudo*, it was observed that prior to the passing of s. 37A of the DDA 1952, the trier of fact could not rely on the presumption of trafficking without first making an actual factual finding on possession. Section 37A was then passed for the purpose of expressly permitting the trier of fact to presume trafficking by also presuming possession. This was then styled 'double presumption' or 'presumption upon presumption' as it removed any need for the prosecution, on a charge of 'trafficking', to first prove on the facts and beyond a reasonable doubt its constituent ingredient of 'possession'.

[49] The Federal Court found that, s. 37A to the extent that it allowed the invocation of such a double presumption, was a wholly disproportionate measure as in effect it reversed the presumption of innocence that has long been afforded to any person accused of a crime. The Federal Court accordingly struck down s. 37A as unconstitutional.

[50] In its assessment, the Federal Court in *Alma Nudo* highlighted how the doctrine of proportionality is contained within art. 8(1) and how it is to be read in conjunction with art. 5(1). By this reasoning, any 'law' that deprives a person of his life or personal liberty in express violation of art. 5(1) must also comply with the guarantee of equal protection in art. 8(1) by means of proportionality.

[51] We must state here at once that the doctrine of proportionality is not a means of judicial legislation. It does not involve judges sitting on the bench and deciding what laws they like and do not like; nor does it involve a subjective review by judges of the desirability or popularity of any legislation. As we have stated in earlier decisions such as the authority cited by the applicant in *Lai Hen Beng v. PP* [2024] 1 CLJ 681; [2024] 1 MLJ 225 ('*Lai Hen Beng*'), the courts are not at all to be concerned with legislative desirability (*Lai Hen Beng*, at [102]) as that is purely a question for Parliament.

[52] Proportionality as espoused in the overriding provisions on equality and equal protection of the law in art. 8(1) advocates for a substantive limit against the power of Parliament to legislate as it pleases under the guise of valid legislative restrictions of fundamental liberties. In the case of *Alma Nudo*, this effective departure from equality in the form of proportionality was borne out by the fact that s. 37A of the DDA 1952 so radically changed the notions of fair trial afforded to accused persons in all other criminal trials and across all other offences. The fact that this is the case was articulated by the unanimous decision of the Federal Court in *Alma Nudo* as follows:

> [150] Based on the factors above – the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions – we consider **that s. 37A constitutes a most substantial departure from the general rule, which cannot be justified and disproportionate to the legislative objective it serves**. It is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under art 5. In light of the seriousness of the offence and the punishment it entails, we find that the unacceptably severe incursion into the right of the accused under art. 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under art. 8(1).
>
> (emphasis added)

[53] Reverting to art. 10 from art. 5(1), in *Pung*, it was submitted to the then Supreme Court that legislative restrictions imposed by Parliament against the rights in art. 10(1) through art. 10(2) must be reasonable. As such, the Supreme Court was urged to find that the word 'restrictions' as it appears repeatedly in the sub-clauses of art. 10(2) must be read as 'reasonable restrictions'. The Supreme Court in *Pung* disagreed with that approach of reading words into art. 10(2) that are not there.

[54] Later, in *Azmi Sharom*, the Federal Court upheld the reasoning in *Pung* and accordingly decided that the court would not read words into art. 10(2) including the word 'reasonable' to form the phrase 'reasonable restrictions'. As such, the Federal Court departed from what was held in *Sivarasa* to the extent that such a reading was upheld and that it gave rise to the 'reasonableness test'.

[55] Yet, the Federal Court in *Azmi Sharom* made it abundantly clear that the doctrine of proportionality is an entirely separate legal creature and legal existence of which the Federal Court unanimously adopted and endorsed. In its analysis, the Federal Court accepted the articulation of proportionality as it appears in art. 8(1) as being applicable to limit the laws that Parliament can pass in line with art. 10(2) to restrict the rights guaranteed by art. 10(1). At [41]-[43], and consistent with earlier decisions such as *Sivarasa* and another Court of Appeal decision in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19; [2006] 6 MLJ 213, the Federal Court in *Azmi Sharom* held that the proportionality test in art. 8(1) applies to art. 10(2).

[56] In other words, the doctrine of proportionality that ensures that legislation or executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved was adopted by the Federal Court (*Azmi Sharom*, at [42]). And hence, the emphatic articulation of proportionality in *Alma Nudo* though made in relation to arts. 5(1) and 8(1) applies with equal force to and in the same way for art. 10(2) read with art. 8(1).

[57] Therefore, based on the state of the law as it presently stands, any laws passed by Parliament are not simply rendered valid because they are passed for the reasons stated in art. 10(2) but that they must also be objectively fair and proportionate to the aim and reasons for those restrictions.

[58] Leaving aside the 'reasonableness test' which has been ruled inapplicable, what remains is to test the validity of s. 9(5) through the lens of proportionality as espoused in art. 8(1) read with art. 10(2), and that too in accordance with established high judicial authority in cases such as *Azmi Sharom* and *Alma Nudo*.

Whether Subsection 9(5) Satisfies The Test Of Proportionality

[59] As alluded to earlier, the respondent argues that s. 9(5), to the extent that it seeks to ensure compliance with s. 9(1), is a proportionate legislative measure which Parliament has deemed necessary or expedient in the interest of the security of the Federation or any part thereof or public order.

[60] Neither we nor the parties in this case deny that s. 9(5) was passed for that purpose and therefore carries with it a legitimate legislative aim. The only question, applying the same analysis in *Alma Nudo* is whether the measure adopted in s. 9(5) is proportionate to that legitimate legislative aim.

[61] In his argument, the applicant seeks to rebut the respondent's assertion of proportionality. He claims that s. 9(5) is in effect harsh and oppressive and that it disproportionately seeks to curtail the right to freedom to peaceful assembly. For the avoidance of doubt, we must restate that the applicant in

no way challenges the notification requirement of s. 9(1) but that it is his case that the means by which Parliament seeks to enforce compliance with it through the punishable offence in s. 9(5) is a disproportionate legislative measure.

[62] The applicant's reasons for contending that s. 9(5) is disproportionate are, briefly, as follows:

(i) the PAA 2012, when it was passed, represented a regime change from that of the Police Act 1967 (Act 344) ('PA 1967'). Section 27 of the PA 1967 in effect stipulated that any assembly without a license would be deemed an unlawful assembly and all persons attending, found at or taking part in such assembly and all persons taking part or concerned in convening, collecting or directing such assembly shall be guilty of an offence. By contrast, the PAA 2012 no longer imposes such a stringent rule in that assemblies are no longer unlawful simply because they were conducted without a license. Further, there is nothing in the PAA 2012 that allows the police to disperse an assembly purely for the fact that no s. 9(1) notice had been given prior;

(ii) viewed in this way, there is nothing in the PAA 2012 that renders the fact of peaceful assembly itself unlawful other than failing to meet certain other conditions or restrictions relating to it. In other words, there is no such thing as an unlawful peaceful assembly because all such assemblies are by default lawful. The lack of notice under s. 9(1) cannot then, according to the applicant, be declared as a basis to render an otherwise peaceful assembly unlawful;

(iii) the existence of s. 9(5) therefore serves to revive the earlier regime in the PA 1967 and in effect serves to take away the right after having created the illusion of giving it;

(iv) subsection 9(5) is in effect discriminatory because of the notification requirement in s. 9(1) does not bear any impact on the attendee(s) of any assembly organised without such notice. In other words, no criminal action can perceivably be taken against the assembly-goer. All such action that is taken can only be taken against the organiser;

(v) even if actions that are taken only against the organiser, the definition of 'organiser' is also vague and nebulous and can possibly include in some cases all persons in a corporation if the corporation is the organiser and even catch any person who has a role in promoting the assembly including the person who arranges for the bus to the assembly;

(vi) further, according to the applicant, there are more than enough laws such as ss. 141 to 160 of the Penal Code and provisions of the Societies Act 1966 and other written laws which more than comprehensively

A deal with non- peaceful and unlawful assemblies such that there is no perceivable nexus or justification for the enactment of s. 9(5) which deals with lawful assemblies that areby default legal as opposed to unlawful assemblies that are illegal;

B (vii) to fortify the point made immediately above, the applicant asserts that s. 9(5) allows for prosecutions against organisers of such assemblies irrespective of the fact that such assemblies are organised without notice and end peacefully and without arms;

C (viii) viewed as a whole, s. 9(5) does not have any nexus to peaceful assemblies and simply just thrusts an additional burden upon organisers to comply with the notice requirement irrespective of the nature of the assembly and its peaceful outcome.;

D (ix) in this regard, s. 9(5) has the chilling effect of controlling whether peaceful assemblies can even, in the first place, be held as it completely disables urgent assemblies that are shorter than the notice period by threatening prosecution against the organiser and without any legal consequence to assembly-goers and bearing in mind the vague statutory definition of 'organiser'; and

E (x) when adjudged in totality, it is the applicant's submission that s. 9(5) in effect serves more as a blanket prohibition than it does as a restriction;

[63] In our assessment of the respondent's case, the respondent has not really substantively addressed any of the applicant's assertions with credible arguments. Having regard to the overall circumstances and nature of the F arguments advanced by the applicant, we agree that s. 9(5) fails to meet the threshold of proportionality espoused in art. 8(1).

[64] In explaining our reasons, we find that s. 9(5) is a discriminatory restriction that disproportionately curtails the right to the freedom of peaceful assembly guaranteed by art. 10(1)(b).

G

[65] We accept that the PAA 2012 was passed with the express and implied intention of preserving the right to peaceful assembly guaranteed by art. 10(1)(b). However, in this equation, it does not appear to us that s. 9(5) when read with sub-s. 9(1) is, when considered in totality, consistent H with that noble intention.

[66] If s. 9(5), as the respondent suggests, is to ensure that the police are notified of any upcoming assemblies so that they can be on guard to take protective action, then such an intention is clearly not manifest in the way it is couched. For one, we agree with the applicant that it imposes a separate I and onerous duty on the organiser of the assembly to provide notice quite apart from the nature of the assembly.

[67] In other words, an organiser, whomever that person is and who fails to give notice of an assembly can be charged with and convicted of an offence under s. 9(5) even if the assembly takes place and ends peacefully. This offence discriminates the organiser against the gatherers of his or her assembly who commit no offence while the organiser is guilty of one.

[68] In this regard, we cannot agree with the respondent that sub-s. 9(5) simply seeks to incentivise or strictly enforce the notice requirement in sub-s. 9(1) to protect, preserve, or balance on the one side public order and security and on the other, the constitutional right to assemble peaceably. In other words, the respondent's reading of sub-s. 9(5) is only valid if we adopt a myopic view of that subsection and ignore the rest of its legal implications and overall chilling effects on an otherwise valid legal right to assemble peaceably and without arms.

[69] In this sense, when considering and adjudging s. 9(5) and its implications on the whole, we find much force in the point made by the applicant that s. 9(5) appears to be a blanket prohibition rather than a restriction. And, in this regard, it is crucial that we factor into our analysis the fundamental difference between the two terms.

[70] To our minds, the word 'restriction' suggests that the act in question is permissible but that instead of a blanket right to exercise it in howsoever way one pleases, Parliament can impose certain restrictions or rules regarding the exercise of the right. In this sense, Parliament does not interfere with or control the substantive right itself rather, it regulates the way and manner and means by which it is done without hampering the right itself. An example of this is contained in s. 15 itself which stipulates, in our view, some examples of restrictions, *eg*:

> Restrictions and conditions
>
> (1) The Officer in charge of the police District may impose restrictions and conditions on an assembly for the purpose of security or public order, including the protection of the rights and freedoms of other persons.
>
> (2) The restrictions and conditions imposed under this section may relate to:
>
> (a) the date, time and duration of assembly;
>
> (b) the place of assembly;
>
> (c) the manner of the assembly;
>
> (d) the conduct of participants during the assembly;
>
> (e) the payment of clean-up costs arising out of the holding of the assembly;

A (f) any inherent environmental factor, cultural or religious sensitivity and historical significance of the place of assembly;

(g) the concerns and objections of persons who have interests; or

(h) any other matters the Officer in charge of the police District deems necessary or expedient in relation to the assembly.

B (3) Any person who fails to comply with any restrictions and conditions under this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

[71] By stark contrast, a 'prohibition' is a total denial of a given right. So, C for instance, a prohibition against the right to assemble peaceably would entail a measure that completely denies any person from performing that act whatsoever.

[72] In this regard, s. 9(5) bears several implications that matched it as a prohibition. The first real legal effect of that subsection is that no person is D entitled to organise a peaceful assembly unless he or she first provides notice under s. 9(1) for otherwise they are liable for a criminal sanction. This includes urgent assemblies that could not otherwise be held within a number of days less than the notice period. While people who attend the said assembly can suffer no criminal action for attending without notice, the E organiser (whoever that might be) remains liable to a criminal charge. The result is a chilling effect on all organisers who are discouraged from ever organising such assemblies for fear of prosecution for a lack of notice.

[73] The overall result produced from such a conclusion is that the Parliamentary intent here appears to be that assemblies cannot ever be held F in such a situation due to the impossibility of being able to give any notice of it. This complete denial of the right to assemble is clearly not a restriction but a disguised prohibition.

[74] Next, and this point also speaks to s. 9(5)'s nexus to the legitimate aim in art. 10(2)(b), is the fact that the failure to give notice as per s. 9(1), does, G for the purposes of sub-s. 9(5), remain an offence even if the assembly was conducted peacefully and even when it ends peacefully. In that sense, we cannot appreciate how s. 9(5) can by any means be said to bear any nexus to the preservation of public order and security if a person may be charged for holding what was an otherwise peaceful assembly.

H **[75]** Whilst s. 21A empowers the police with the consent of the Public Prosecutor to offer to compound the offence under s. 9(5) instead of to pursue a criminal prosecution, that decision is still vested in the authorities who could still determine to charge the organiser as happened in the instant case before us. We add for emphasis that whether or not there is compliance with I the notice requirement under s. 9(1), there is no question that should any

such assembly turn unruly, become unlawful or cease to be peaceful, the police are fully empowered to take action in respect of offences against public tranquillity under Chapter VIII of the Penal Code. Indeed s. 20(1) too itself empowers the police to arrest any organiser or participant who, during an assembly, refuses to adhere to any restrictions under s. 15 or has in his possession any arms; whilst s. 21(1) vests in the police the power to disperse any assembly where for example, any person at the assembly commits any offence under any written law; or where the participants engage in disorderly conduct or violence towards persons or property in respect of which the failure to abide by any such order for dispersal is an offence under s. 21(3).

[76] In our view, assemblies do not often happen spontaneously or serendipitously. It is a very logical and reasonable thing to conclude that it takes time, planning and resources to get more than two people to gather at any location and place with the intention to assemble peacefully.

[77] From this perspective, the act of criminalising the right of any citizen to organise an assembly is no different than any incursion on another citizen's right to attend such an assembly. Yet, s. 9(5) makes this distinction by criminalising the organising of an assembly but not the attending of the assembly itself. To make matters worse, the offence in s. 9(5) fastens even in a situation where the assembly so organised ends peacefully as its organiser may nonetheless be called to face a criminal charge for, in effect, organising a peaceful assembly – a right otherwise guaranteed to him by art. 10(2)(b).

[78] When we consider this scenario in context, it yet again presents itself to us as a prohibition against a citizen's right to assemble peacefully rather than a restriction of it.

[79] In this assessment, we particularly convinced in particular by the argument advanced by the counsel for the *amici curiae*, The Clooney Foundation for Justice and Suaram. In his assessment of proportionality in international jurisprudence and which our constitutional law reflects, the existence of less intrusive legislative measures or restrictions though not entirely dispositive on constitutionality, is an important consideration in adjudging the proportionality of that measure or restriction.

[80] In other words, if less intrusive measures are available to Parliament to restrict the right in question, the fact that the more intrusive measure was used points to disproportionality.

[81] In this regard, learned counsel Lim Wei Jiet referred to the judgment of the Constitutional Court of South Africa in *Mlungwana And Others v. S And Another* [2018] ZACC 45 ('*Mlungwana*') in holding as follows:

> [96] The applicants and amici curiae identified various less restrictive means to incentivise the giving of notice under the Act. These are:

A (a) notice assures the conveners that the police cannot restrict the protest under s. 9(1)(c);

(b) civil liability for riot damage under s. 11 that follows from a failure to take reasonable steps to prevent the damage (which includes giving notice);

B (c) existing common law and statutory crimes regarding public disruption and violence;

(d) enhanced civil liability for conveners who fail to give notice;

(e) administrative fines; and

C (f) amending the definition of gathering such that notice is only required when police presence will be necessary.

[97] The respondents advance two responses to these less restrictive means. First, that none of these place criminal liability at the foot of the convener for failing to give notice. It may be true that there is no other D way of punishing a convener for failing to give notice other than criminalising such a failure. But this was not the mainstay of the respondents' case. As explained above, the argument was not that failure to give notice should be criminalised regardless of whether it deters the failure to give notice. Instead, the argument is that the purpose behind s. 12(1)(a) is to criminalise failure to give notice precisely because it E incentivises the giving of notice. Thus to argue that no other means can punish the convener is to change the purpose of s. 12(1)(a) to a purpose that was not substantiated on the papers before us. No argument was made as to why failure to give notice should be criminalised independently of encouraging conveners to give notice.

F **[82]** The constitutional court was not persuaded by any of the arguments advanced by the respondents in that case and in rejecting those arguments observed thus:

[99] The respondents' second response is that the applicants have failed to provide evidence of how these less restrictive means incentivise notice as effectively as the criminal sanction does. This argument is misplaced. G *The onus is on the respondents to prove that the limitation created by s. 12(1)(a) is justified. In that event, there is no reason to think why the less restrictive incentives identified by the applicants and amici will not work just as well as criminalisation, without the far-reaching consequences flowing from a conviction.*

(emphasis added)

H **[83]** Accordingly, the South African Court found that s. 12(1)(a) of their Regulation of Gatherings Act 1993 (Act No. 205 of 1993) ('RGA 1993') which is substantively similar to our s. 9(5) was a disproportionate restriction to the right of peaceful assembly and deemed the said s. 12(1)(a) unconstitutional.

I **[84]** For convenience, the said s. 12(1)(a) of the RGA 1993 which is very similar in principle to our s. 9(5) provides:

Offences and penalties

12. (1) Any person who:

(a) convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of s. 3; ...

(b)-(j); ...

shall be guilty of an offence and on conviction liable to a fine not exceeding R20000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[85] Reverting to our case and in relation to our s. 9(5), we do not for a moment doubt the respondent's noble argument that s. 9(5) is intended to protect public rights and order in line with the purposes stated in art. 10(2)(b) especially in cases where the police are duly informed of an upcoming assembly and can take all measures necessary to preserve public order and security.

[86] That said, when we consider s. 9(5) in totality and the major problems that arise from the overall effects of s. 9(5) including on the right of any person to organise an assembly; and how s. 9(5) read with s. 9(1) has a prohibitory effect on the right to assemble peaceably, we have no reservation in concluding that s. 9(5) is a disproportionate incursion into the right to peaceful assembly guaranteed to all citizens by art. 10(1)(b). We further conclude that s. 9(5) is in excess of any restrictions that may be imposed on any of the permissible grounds stated in art. 10(2)(b).

[87] Given our aforesaid conclusion, we find that s. 9(5) is not validly enacted under art. 10(2)(b). It cannot, therefore, be deemed as validly restricting the right guaranteed to all citizens by art. 10(1)(b). Section 9(5) therefore violates the right to peaceful assembly under art. 10(1)(b) and must be struck down as null and void under art. 4(1).

Final Observations

[88] Considering our substantive deliberations on the constitutional validity on s. 9(5) in this case, we see no reason to delve deeper into the arguments raised for or against the proposition in either *Nik Nazmi* or *Yuneswaran*. Suffice it for us to say that the conclusion arrived at by the Court of Appeal in *Nik Nazmi* is correct and that as such, *Yuneswaran*'s conclusion is wrong. *Yuneswaran* is hereby overruled and shall have no value as judicial precedent.

[89] As for the questions, we answer them as follows.

[90] Regarding question 1 (first part), our answer is in the affirmative – we find that s. 9(5) is unconstitutional for it being inconsistent with art. 10(2)(b) read with art. 8(1) of the FC. As for the second part of question 1, we do not consider it necessary to deal with the *stare decisis* point for the reasons adverted to earlier. To briefly recapitulate our earlier point, both *Nik Nazmi* and *Yuneswaran* were superseded by apex court decisions in *Azmi Sharom* and *Alma Nudo* and our reliance on those cases renders moot any discussion on whether the Court of Appeal in *Yuneswaran* ran afoul of *Young* and *Dalip* by departing from *Nik Nazmi*.

[91] As for question 2, it asks whether s. 9(5) of the PAA 2012 is unconstitutional for being inconsistent with art. 10(2)(a) of the FC on the rights to freedom of speech and expression read with art. 8(1) of the FC. Considering our finding that s. 9(5) is void for violating the right to freedom of peaceful assembly, and we do not consider it necessary to discuss further the substantive arguments on its implications for the rights to freedom of speech and expression. We therefore decline to answer question 2.

Conclusion

[92] For the reasons aforesaid, we have answered the constitutional questions in this case in such a manner that should enable the High Court to justly and expeditiously dispose of the proceedings before it in accordance with our judgment herein and otherwise according to law. We do hereby and accordingly remit this case to the High Court.

[93] Finally, it is our view that this is a public interest litigation and, as such, there shall be no order as to costs in respect of these proceedings before us.